85-1078

No. 85-_____

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BLUE BELL, INC.,

Petitioner,

vs.

FRANK WILHELM and HAROLD L. KOGUT.

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

WILLIAM L. AUTEN
W. T. CRANFILL, JR.
JOHN O. POLLARD
Attorneys for Petitioner and Counsel of Record
3700 NCNB PLAZA
CHARLOTTE, N.C. 28280
(704) 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, N.C.

39pp

QUESTION PRESENTED

In the **absence** of evidence tending to show any pattern of discharging older employees, and where no evidence tends to prove any employment policy or practice that had a "disparate impact" upon older employees, and where no evidence even suggests that younger employees with similar performance deficiencies retained their jobs; but where, instead, incontrovertible record evidence establishes:

> (1) That an "under forty" employee was discharged at exactly the same time and for precisely the same reasons as an "over forty" claimant; and
>
> (2) That another "over forty" claimant was discharged after his undeniable and unexplained failure and refusal to make the number of sales calls specifically required by his manager;

Should not the trial court exercise proper "jury control" and direct a verdict or enter judgment notwithstanding the verdict upon the employer's timely motions?

PARTIES TO THE PROCEEDING[1]

In addition to the parties set forth in the caption of this Petition, Karl F. Gatlin appeared as a plaintiff in the trial court. The jury, however, found that Gatlin had not filed a timely age discrimination charge with the Equal Employment Opportunity Commission. Accordingly, upon Gatlin's claim, judgment was entered for Blue Bell, and Gatlin's claim was not at issue in the Circuit Court.

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[1] In compliance with Rule 28.1, according to information supplied to counsel of record for Blue Bell, Inc., it has no parent company, subsidiaries, or affiliated corporations.

TABLE OF CONTENTS

	Page No.
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING . . .	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	4
A. Proceedings Below	4
B. The Factual Background . .	6
REASONS FOR GRANTING THE WRIT. .	14
This Case Reveals a Clear Need for the District Courts Scrupulously to Consider Whether a Finding of Intentional Age Discrimination Could Be Said To Be Supported by "Rationally Probative" Evidence, in Order To Assure that Jury Verdicts Will Not Be Based Upon "Sympathy" or Upon Improperly Subjective Perceptions of Employers' Decisions	14
A. This Case Presents An Important Question of Federal Law That Should Be Settled By the Court	14

B. Blue Bell Was Entitled To a Directed Verdict or To Judgment Notwithstanding the Verdict. 21

CONCLUSION 34

TABLE OF AUTHORITIES

Cases:

Loeb v. Textron, Inc., 600 F. 2d 1003 (1st Cir. 1979). 24

Lovelace v. Sherwin-Williams Co., 681 F. 2d 230 (4th Cir. 1982) 17-20 22

Moore v. Sears, Roebuck & Co., 683 F. 2d 1321 (11th Cir. 1982) 24

Pullman-Standard v. Swint, 456 U.S. 273 (1982). 16

Statutes:

Age Discrimination in Employment Act of 1967, 29 U.S.C. §623 3

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BLUE BELL, INC.,

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vs.

FRANK WILHELM and HAROLD L. KOGUT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays the Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that the Court may review a decision rendered by the Circuit Court in a case involving the parties above-

named, and the Petitioner respectfully shows to the Court:

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 773 F. 2d 1429 and may be found in the Appendix filed herewith (Pet. App. 1-27).[2] The District Court's Orders entered subsequent to the jury's verdicts are not reported but also may be found in the Appendix (Pet. App. 28-57).

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of the Age Discrimination in Employment Act of 1967 (29

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[2]"Pet. App." refers to the Appendix filed with this Petition.

U.S.C. §621 et seq.) ("ADEA" or "the Act") are as follows:

Section 4 of the Act, 29 U.S.C. §623, provides in pertinent part:

> ". . . It shall be unlawful for an employer --
>
> (1) . . . to discharge any individual . . . because of such individual's age;
>
> * * *
>
> It shall not be unlawful for an employer . . . --
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . .; [or]
>
> * * *
>
> (3) to discharge . . . an individual for good cause."

STATEMENT

A.

Proceedings Below

Frank E. Wilhelm (hereinafter "Wilhelm") alleged that Blue Bell, Inc. (hereinafter "Blue Bell") had discharged him because of his age in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §621, et seq. Wilhelm also alleged that his discharge was without just cause and violated an implied covenant of good faith and fair dealing.

Harold L. Kogut (hereinafter "Kogut") later intervened, also alleging that his discharge violated the Act and, further, that Blue Bell had terminated his employment in retaliation for his having given deposition testimony in Wilhelm's lawsuit.

The District Court dismissed the pendent "just cause" claims. Subsequently, a jury returned verdicts in favor of both

Wilhelm and Kogut (See Pet. App. 29-31). Having previously made timely motions for directed verdicts, Blue Bell moved for judgment notwithstanding the jury's verdicts. Blue Bell's j.n.o.v. motion was denied (Pet. App. 55-57), and the District Court entered final judgment awarding Wilhelm and Kogut backpay, reinstatement, attorneys' fees and costs (Pet. App. 29-54).

Upon jury findings that Blue Bell willfully had violated the Act (See Pet. App. 29-31), the District Court awarded Wilhelm and Kogut liquidated damages equal to their backpay awards (Pet. App. 29-36). Blue Bell gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, and the District Court entered an Order granting a stay of the judgment pending appeal (Pet. App. 28).

The Circuit Court affirmed "the district court's denial of Blue Bell's motion

for judgment notwithstanding the verdict" but remanded "the case for a new trial", upon the liquidated damages issue only, "under a proper willfulness instruction" (Pet. App. 26-27).

B.

The Factual Background

This case presents two "disparate treatment" claims of allegedly intentional employment discrimination. Those claims are that two former Blue Bell salesmen were discharged **because** they were "over forty", and that, in addition, Kogut was discharged in retaliation for his having given deposition testimony in Wilhelm's lawsuit.

There has been absolutely no evidentiary showing that Blue Bell engaged in any pattern of discharging "over forty" salesmen. Furthermore, there has been no claim or showing that Blue Bell's discharges of two salesmen reflected any employment

practice or policy having a "disparate impact" upon "over forty" salesmen. Indeed, the record evidence is exactly to the contrary.

From the year 1977 through the end of 1983, Blue Bell discharged a total of six Southeastern Region Boyswear salesmen; **only** the two claimants in this case were "over forty", and the other four discharged salesmen were "under forty". It also is indisputable that in Kogut's division, **after** he and an "under forty" salesman had been terminated for precisely the same reasons, **all** of the remaining salesmen were "over forty". There is absolutely no record evidence tending to show that **any** "under forty" salesman whose performance was similar to either Wilhelm's or Kogut's remained in Blue Bell's employ. Furthermore, it is (at the least) relevant that both Kogut and Wilhelm were

"over forty" when they initially were hired as Blue Bell salesmen.

The record decidedly does not establish that Wilhelm or Kogut were subjected to any "disparate treatment". Neither of them denied the performance deficiencies that ultimately resulted in their discharges. Their cases were premised entirely upon their irrelevant past performances and "accolades" and upon somewhat favorable -- but notably selective -- elements of their performance immediately prior to their discharges.

During seven of his eleven years as a Boyswear salesman, including prosperous times when orders literally had rolled in, Kogut had failed to achieve his commission goal. Indeed, in his last two complete years as a salesman, Kogut achieved, respectively, only about sixty percent and fifty percent of his commission goals. He and an "under

forty" salesman were discharged for failure to fulfill specified standards during an eight-week evaluation. Blue Bell's standards were specific and objective and Kogut needed only to mechanically comply with them.

Rather than reflecting any "disparate treatment" affecting Kogut, the record conclusively establishes that Kogut was afforded exactly "the identical treatment" afforded salesman Randy Cloud. Cloud was thirty-six when he was discharged and had served as a Southeastern Region Boyswear salesman for approximately nine years until, on the same day as Kogut, he was discharged because of similar substandard performance during an eight-week evaluation. Both Kogut and Cloud were evaluated upon identical criteria, during an indentical eight-week period, and both received interim counselling with respect to their failures to fulfill the

evaluation standards. Both Kogut and Cloud were discharged on the same day and for the same reason. It is indisputable that Kogut and Cloud were afforded exactly parallel treatment.

With respect to Kogut's "retaliation" claim, the unrebutted record evidence is that Blue Bell's management made a conscious decision **not** to terminate Kogut for an insubordinate, purely voluntary election to attend a deposition (for which he had not been subpoenaed) rather than to attend a scheduled Company meeting. Moreover, the uncontradicted evidence remains that Blue Bell discharged both Kogut and an "under forty" salesman as a result of their similar substandard performances during an eight-week evaluation.

The circumstances resulting in Wilhelm's discharge were different, but just as surely fail to reflect any "disparate

treatment". Wilhelm had been placed on probationary status because he had failed to meet performance goals established by his supervisor. While failing to meet those goals, Wilhelm also had been the lowest performer in his Region, and these circumstances resulted in the decision to place him on probation.

Although Wilhelm's probation apparently motivated him to improve his performance, that performance immediately and noticeably again deteriorated when his probation ended. Specifically, Wilhelm and all other Southeastern Region salesmen were instructed in late December, 1981, to go "on the road" immediately after the New Year and to make twenty "line presentations" per week. Based on his own contact reports, Wilhelm made only one such line presentation during the first week of January, two

during the second week, and only four during the third week of that month.

Wilhelm did not and could not contradict the above-summarized evidence but did assert that he was twenty-one percent ahead of his previous year's performance when he was discharged. This evidence, however, only tends to establish that he was twenty-one percent ahead of production figures that undeniably had resulted in his being placed on probationary status -- that is, he was about twenty percent ahead of production figures which, except for his later improvement during the probationary period, would have resulted in his earlier discharge.

The essential thrust of Wilhelm's proof, which almost certainly influenced the jury, was that in past years he had received various sales awards. Such proof is marginally relevant, at best, and reflected performance during times when Blue Bell's

salesmen could simply record large orders from large customers without developing and working their territories. When changed business conditions dictated that Blue Bell's salesmen should actively develop and travel within their territories, Wilhelm resisted any changes in his modus operandi and, as the record conclusively establishes, disregarded specific management directives concerning the number of calls he was expected to make. Wilhelm's recalcitrance led him from probation to discharge; and there is clear evidence that his discharge was because of his desultory job performance.

Although Wilhelm and Kogut engaged in extensive discovery, they were unable to offer any evidence that any "under forty" salesman remained in Blue Bell's employ with a performance record similar to Kogut's or Wilhelm's.

REASONS FOR GRANTING THE WRIT

This Case Reveals a Clear Need for the District Courts Scrupulously to Consider Whether a Finding of Intentional Age Discrimination Could Be Said To Be Supported By "Rationally Probative" Evidence, in Order to Assure that Jury Verdicts Will Not Be Based Upon "Sympathy" or Upon Improperly Subjective Perceptions of Employers' Decisions

A.

This Case Presents An Important Question of Federal Law That Should Be Settled By the Court

Blue Bell respectfully and earnestly urges that the Court's discretion should be advised to review this case, because a significant federal issue is squarely presented. It is suggested that the issue of proper "jury control" in age discrimination cases needs to be addressed by the Court. This "disparate treatment" case is a peculiarly appropriate vehicle for consideration of the issue. This is because there is in the present case absolutely no evidence -- which

might be said to support jury verdicts in other cases -- of any pattern of employment discrimination because of age or of any employment policy or practice having a "disparate impact" upon older employees. Thus, the sufficiency of the evidence in this case would be reviewed in the context of employment decisions affecting individual claimants in largely undisputed factual circumstances.

It also is believed to be pertinent that quite substantial damages verdicts have been returned in this case, and it is respectfully suggested that such awards in other similar cases invite attention to the concern that juries may be deciding age discrimination claims "by impermissible but understandable resort to such factors as sympathy and the like" (See Lovelace v. Sherwin-Williams Co., 681 F. 2d 230, 242 (4th Cir. 1982)). Indeed, there seems to be an

increasingly widespread perception among judges and lawyers that juries may too easily and improperly be persuaded that an employment decision has been made "because of age".

The Court has, of course, previously addressed issues relative to "ultimate motivational findings" in employment discrimination cases (See, e. g., Pullman-Standard v. Swint, 456 U.S. 273 (1982)). Blue Bell respectfully asserts, however, that there is need for the Court to establish a more definitive demarcation between a sufficiency of "rationally probative" evidence and an insufficiency of such evidence permitting "speculation over unfounded claims" (See, Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 242).

With all respect, it is suggested that in the case at bar the jury's verdict has been given legally improper deference. Nevertheless, Blue Bell does contend that

the Court of Appeals for the Fourth Circuit has, in an earlier opinion, perceptively addressed the above-mentioned concerns and the need for proper "jury control" in cases such as Blue Bell's. Although Blue Bell submits that the Fourth Circuit, as quoted below, has articulated the proper standards for review of jury verdicts, Blue Bell also urges that in the present case such standards have been misapplied.

> "[The] emphasis, where causation is dispositive, upon 'probability,' 'reasonable probability,' 'substantial probability' rather than mere 'possibility' as the proper test simply bespeaks special danger that in a matter so generally incapable of certain proof jury decision will be on the basis of sheer speculation, ultimately tipped, in view of the impossibility of choosing rationally between mere 'possibilities,' by impermissible but understandable resort to such factors as sympathy and the like. It is of course precisely to guard against this danger that the burden of producing rationally probative evidence -- and the corresponding risk of nonproduction -- is placed upon claimants and subjected to the ultimate jury control devices of directed

verdict and judgment n.o.v. See, Brady v. Southern Railway Co., 320 U.S. 476, 480 . . . (1943) (to guard against 'the mischance of 'speculation' [illegible] unfounded claims'), Galloway . United States, 319 U.S. 372, 395 . . . (1942) (to insure that speculation be not allowed to do duty for probative facts'). The special danger in the causation context invites and justifies the special emphasis" [emphasis added].

* * *

"The ultimate motivational issue has now become whether, considering only age discrimination and the defendant's proffered reason as possible explanations, discrimination is the 'more likely' [citation omitted]. The plaintiff's new production burden has correspondingly become whether, as between only these two proffered reasons, the circumstantial evidence supports as a reasonable probability the inference that but for claimant's age he would not have been [discharged]" [emphasis added].

* * *

"The essential facts underlying defendant's articulated reason -- the critical record indicia of unchecked and steady decline in performance results for at least the final two years of claimant's tenure as store manager and his refusal, for whatever reason, during that critical period to admit or to take corrective action

specifically suggested by his employer -- were not essentially refuted despite the opportunity to do so by way of showing the reason based upon them to be pretextual. Claimant's evidence on this score consisted essentially of offering his own opinion that corrective action was not needed and of pointing to other favorable performance indicia, while not refuting the validity of the unfavorable indicia nor their manifestly greater significance in evaluating his most recent performance; to testifying that his employer's fault-finding only commenced in the late stages of his tenure as store manager [footnote omitted] rather than demonstrating that no fault existed; and to the expression of his own opinion that his performance continued to meet reasonable expectations.

"Taken all together -- whether offered directly to establish the 'qualification' predicate of the original presumption or to show defendant's proffered explanation of his demotion to be pretextual -- claimant's evidence did not suffice to allow a jury to infer that age discrimination was a determinative factor in this demotion. Though age discrimination is undoubtedly a possibility in any case of this kind, and though its easy concealment is a constant danger in attempts to vindicate this statutory right, a jury may nevertheless not be allowed to infer it from evidence that does no more than suggest it as a possibility.

* * *

". . . There is the further fact that the employer did in the latter stages of claimant's tenure begin increasingly to find specific fault with his performance, and to suggest specific corrective measures. From this claimant argues that the jury could and should be allowed to . . . infer a deliberate contrivance to set up claimant's demotion. Again, this is obviously a possibility, but the leap of inference required is simply too large to allow in logic and fairness. To accept it a jury would have to lay aside the unrefuted evidence that problems did exist and infer instead a deliberate scheme carried out carefully over a period of around two years, involving the extensive, venal efforts of several people and having as its final object only the demotion, not the outright discharge, of a single employee at the end of this extended plot. Such a leap of inference could only be by rank speculation and not by any rational processes of inference.

"When, as is proper, the unrefuted basic facts underlying the employer's proffered explanation of the demotion are taken into account in assessing the reasonableness of the necessary inference, we are satisfied that the district court properly granted judgment n.o.v."

Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 242, 244, 245 and 246

Blue Bell will argue below that the above-quoted analysis should apply equally to the evidence in the case at bar.

B.

Blue Bell Was Entitled To a Directed Verdict or To Judgment Notwithstanding the Verdict

As mentioned above, it is incontrovertible that from 1977 through 1983, only two "over forty" Southeastern Region Boyswear salesmen -- Wilhelm and Kogut -- were discharged. During the same period, however, four other "under forty" salesmen also were discharged. Again, one of these "under forty" salesmen was discharged at exactly the same time and for exactly the same reasons as Kogut.

Blue Bell contends that its essentially unrebutted articulation of legitimate, non-discriminatory reasons for

discharging Kogut and Wilhelm precluded any legally permissible inference of intentional discrimination because of age, even if it could be concluded that the claimants somehow made out prima facie cases. Kogut and Wilhelm failed to prove by the requisite preponderance of evidence that they would not have been terminated "but for" the fact that they were "over forty". On the record in this case, which undeniably includes clearly articulated, non-discriminatory and legitimate business reasons for Blue Bell's actions,

> ". . . [A]ge simply exists . . . as one of any number of possible reasons -- including poor business judgment by the employer [citation omitted] -- for the [discharges]. On this basis to find age a determinative cause could only be by outright conjecture and not by any rational assessment of probabilities."
>
> Lovelace v. Sherwin-Williams Co., supra, 681 F. 2d at 243-244

Neither Kogut nor Wilhelm offered evidence that they were subjected to any kind of "disparate treatment". That is, there is absolutely no record evidence that any "under forty" salesman having an equal or worse performance record remained in Blue Bell's employ.

It is indisputable that, prior to their discharges, Blue Bell specifically informed both Kogut and Wilhelm of deficiencies it perceived in their performance of their jobs. There is absolutely no evidentiary indication that any salesman did remain or would have remained in Blue Bell's employ after he, like Kogut and thirty-six-year-old Randy Cloud, had been warned about but had persisted in substandard performance during an eight-week evaluation. Neither a jury nor the courts are permitted to adjudge the propriety, wisdom or fairness of Blue Bell's criteria, which cannot be said to

have been "aimed at" older salesmen (See Loeb v. Textron, Inc., 600 F. 2d 1003, 1012, n. 6 (1st Cir. 1979) and Moore v. Sears, Roebuck and Co., 683 F. 2d 1321, 1323 n. 4 (11th Cir. 1982)).

There also is absolutely no evidentiary indication that any other salesman did remain or would have remained in Blue Bell's employ after he, like Wilhelm, had been instructed to make twenty "line presentations" **per week** subsequent to a stated date but made one, two and four "line presentations" in the three weeks following the stated date. No other salesman remained in Blue Bell's employ although during the month following such specified date he had worked the fewest accounts of any salesman in the Region, although during that month his relative "salesman efficiency" had been the lowest in the Region, and although during that

month his total number of "accounts developed" had been the lowest in the Region.

Wilhelm offered evidence of his "**historical**" performance and "accolades", primarily resulting from sales volume that "historically" had been substantially self-generating. Wilhelm did not demonstrate that he earned anything except justly-deserved criticims, warnings, and probationary status during the last year of his employment.

Blue Bell freely acknowledged that Wilhelm in fact did much better **after** he was placed on probationary status, resulting in his being relieved from that status instead of then being discharged. As the record conclusively demonstrates, however, Wilhelm essentially quit working after his probation ended. He failed and refused to make the "line presentations" he specifically had been instructed to make; instead of making **sixty** line presentations in the first three

weeks of January, 1982, as he had been instructed to do, Wilhelm actually made a total of **seven** line presentations during those three weeks.

Wilhelm's only response was that, nevertheless, his naked sales volume figures were better than his figures for the previous year. The previous year's figures, however, had resulted in Wilhelm's being placed on probation. This so-called "improved" performance in January, 1982, resulted in the lowest relative "salesman efficiency" in the Region, the fewest "accounts developed" in the Region, and the lowest bookings in the Region. Wilhelm previously had been afforded the opportunity to alter his "modus operandi". There is no rational basis for a finding that he would have been given yet another chance "but for" his years.

As previously specified, Kogut and an "under forty" salesman were discharged for

failure to fulfill specified standards during an eight-week evaluation. Blue Bell's standards were specific and objective, and Kogut needed only to mechanically comply with them. It is legally immaterial and irrelevant whether the jury's or any other person's business judgment would have been advised to impose the same standards that Blue Bell imposed.

Kogut's failure to comply with Blue Bell's standards amounted to an insubordinate refusal to perform assigned tasks. This refusal, regardless of naked sales volume achieved, is a perfectly **lawful** reason for his discharge. Again, there is no evidentiary basis for a finding that Kogut's willful refusal to comply with Blue Bell's standards, after having been counselled, would have been excused "but for" his years. The same willful refusal on the part of Randy

Cloud, the thirty-six-year-old Boyswear salesman, undeniably was **not** excused.

The greater weight of the record evidence clearly suggests that neither Kogut nor Wilhelm would have been discharged "but for" their desultory performance of their sales jobs. Stated obversely, there decidedly is no preponderance of record evidence that they would have remained in Blue Bell's employ "but for" their years.

The Circuit Court concluded that there is, in this case, sufficient "direct" evidence of a general Blue Bell intention to discriminate **because of age**. **All** of the supposedly "direct" evidence is, at best, ambiguous and entirely circumstantial. There is absolutely no record indication that this supposed age-consciousness actually affected Kogut, Wilhelm or any other "over forty" salesman in any fashion. Blue Bell submits that there is no evidentiary

connection between the so-called "direct" evidence of an intention to discriminate and either Kogut's or Wilhelm's termination.

It is reemphasized that the several other "over forty" Boyswear salesmen were totally unaffected by any alleged age-consciousness attributed to Blue Bell's managers. Of the "over forty" salesmen, only Kogut and Wilhelm were discharged (along with an "under forty" salesman) because they resolutely refused to follow their managers' specific directions. It is legally irrelevant whether those specific directions made sense or seemed prudent to Kogut, Wilhelm or the jury. The jurors, however, must have been swayed by the **alleged** general statements reflecting age-consciousness, because they apparently ignored Blue Bell's unrebutted evidence showing undeniable cause for its discharge decisions.

The so-called "direct" evidence of a specific Blue Bell intent to discriminate includes a supervisor's alleged prediction to the effect that "Blue Bell is going to have $15,000 a year college boys for salesmen", who would be paid salaries and expenses instead of commissions and who would be "driving Chevrolets".

If such had been Blue Bell's intent, it undeniably did **not** need to fire "over forty" salesmen to accomplish the desired savings in salaries and benefits. It is indisputable that Blue Bell **could** have made a management decision to place its salesmen on a lower salary scale, pay their expenses, and furnish them Chevrolets. Such a management decision **could** have been made without having to overcome any legal obstacle whatever. The incumbent sales force, which had become accustomed to receiving commissions on high volume sales without really having

to "sell" the product, could either elect to accept the new compensation arrangements or seek other employment.

In these circumstances, it would be utter foolishness to seek to accomplish the same result by firing the incumbent sales force at a cost of defending age discrimination claims. The record decidedly does not reflect any such foolishness. Exactly to the contrary, there is no evidence that any salesman ever was put on a salary, either high or low, without commissions; there is no evidence that any salesman was placed on a low salary with expenses; and there is no evidence that any salesman was, against his will, confined to a Chevrolet. Indeed, the record discloses the exact opposite of any such actions. It is reiterated that **all** of the salesmen who remained in Kogut's division (after Kogut and the "under forty" salesman had been discharged) were "over

forty" and were compensated on the same basis as before.

Kogut and Wilhelm also emphasized their reliance upon alleged supervisory statements to the effect that "older people **tend** to become complacent whereas younger people **generally** have more drive and ambition" [emphasis added]. Any such statements relative to "tendencies" of older salesmen toward complacency or to the "drive and ambition" "**generally**" possessed by younger salesmen do not necessarily reflect any **controlling** bias or prejudice and undeniably also have reference to actual job performance -- "drive and ambition" in sales efforts are much to be preferred over "complacency". Again, the several other "over forty" Boyswear salesmen were absolutely unaffected by the alleged bias and prejudice supposedly reflected in any such statements; and it has not been shown that any "younger" salesman

benefited from the supposed bias and prejudice by receiving any preferential treatment. It is perfectly clear that Kogut's and Wilhelm's job performance did in fact exhibit both "complacency" and an absolute unwillingness to conform to specific management directives.

This unrebutted showing of "complacency-in-fact", and not any vague and ambiguous bias or prejudice, explains their discharges. Like the other "over forty" Boyswear salesmen, Kogut would have remained in Blue Bell's employ "but for" his failure, after specific counselling and warning, to fulfill the evaluation criteria imposed on **all** the salesmen in his division. Wilhelm would have remained in Blue Bell's employ "but for" his absolute refusal to make "line presentations" as instructed by his manager and "but for" the fact that he essentially quit working after his probation ended.

Blue Bell respectfully contends that, as in the Lovelace case, there definitely is in this case no preponderance of evidence that legitimate business reasons were only a "pretext" for the discharges in question. Because the evidence utterly fails to establish any kind of disparate treatment, it should be concluded that the jurors must have been swayed by such extraneous considerations as sympathy, "fairness", and the like in reaching their verdicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William L. Auten
W. T. Cranfill, Jr.
John O Pollard

Attorneys for the
Petitioner